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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of)
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Petition of the People of the)
State of California and the)
Public Utilities Commission of)
the State of California to Retain)
State Regulatory Authority over)
Intrastate Cellular Service Rates)
_____)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PR Docket No. 94-105
PR File No. 94-SP3

COMMENTS OF BAY AREA CELLULAR TELEPHONE COMPANY
ON DRAFT PROTECTIVE ORDER

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October 7, 1994

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Pursuant to Public Notice, DA 94-1083, issued September 30, 1994, Bay Area Cellular Telephone Company ("BACTC") hereby submits its comments on the draft protective order which was appended to that Public Notice. The draft protective order purports to address confidentiality issues raised by the Request for Proprietary Treatment of Documents (the "CPUC's Request") which was filed by the State of California and the Public Utilities Commission of the State of California ("CPUC") in support of its Petition to Retain Regulatory Authority Over Intrastate Rates, filed August 8, 1994 (the "Petition"). BACTC submits that the confidential data redacted from the Petition should not be made available to any party under any circumstances, even under the terms of a protective order, and, in fact, should not be considered by the Federal Communications Commission ("FCC").

I. STATEMENT OF BACTC'S INTEREST.

BACTC is the nonwireline cellular carrier licensed by the FCC and certificated by the CPUC to provide facilities-based cellular service in the San Francisco and San Jose Metropolitan Statistical Areas. BACTC is a partnership controlled indirectly by AirTouch Communications, Inc. and McCaw Cellular Communications, Inc.

The unredacted version of the Petition appears to include a large amount of subscriber number and capacity utilization data which is competitively sensitive and proprietary

to BACTC.¹ BACTC provided this data to the CPUC under seal in response to an order by a CPUC Administrative Law Judge ("ALJ").² This data has been found by a CPUC ALJ to "have commercial value to competitors which could be used to the detriment of the carrier disclosing it"³ and to be reasonably classified as "trade secrets."⁴

If this confidential information became public, BACTC would be irreparably harmed in a number of ways. The confidential data could be used by BACTC's competitors, including GTE Mobilnet, Nextel Communications, Inc., or any of a number of resellers, to evaluate BACTC's market share, cost structure, penetration levels and other characteristics of BACTC's business and the market in which it operates. For example, the number of subscribers on each of BACTC's rate plans⁵ could be used by BACTC's competitors to evaluate the trends in sales and usage of BACTC's various rate plans, thereby enabling them to realign or direct their own operations to be more effective in competing

¹ Because the confidential data is redacted from the public version of the petition it is impossible for BACTC to know exactly what data is included in the unredacted version of the Petition.

² See ALJ's Ruling Directing Parties to Provide Supplemental Information, issued April 11, 1994 in I.93-12-007.

³ ALJ's Ruling Granting in Part Motions for Confidential Treatment of Data at 4, issued July 19, 1994 in I.93-12-007.

⁴ ALJ's Ruling Granting Motion for Modification of July 19, 1994 Ruling at 6, issued August 8, 1994 in I.93-12-007.

⁵ These numbers appear to be listed in the unredacted version of Appendix J to the Petition.

against BACTC for the most profitable segments of BACTC's customer base.⁶

BACTC has opposed the National Cellular Resellers Association Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order, filed in the captioned proceeding on September 19, 1994 ("NCRA Request") and has supported the Motion of the Cellular Carriers Association of California to reject Petition Or, Alternatively, Reject Redacted Information, filed in the captioned proceeding on September 19, 1994 ("CCAC Motion").

II. THE FCC'S CONSIDERATION OF A PROTECTIVE ORDER IS PREMATURE.

It is premature for the FCC to consider the terms of a proposed protective order because neither NCRA or any other party to this proceeding, including the CPUC, has made "a persuasive showing as to the reasons for inspection" as is required by the FCC rules prior to the release of commercially sensitive information.⁷ Nor has any party demonstrated that "the information is a necessary link in a chain of evidence that will resolve a public interest issue."⁸ Moreover as BACTC has previously advised the FCC, the confidential data was disclosed to the FCC by the CPUC illegally. Accordingly, the FCC should not disclose the data to anyone and should not consider the data

⁶ In this way the cellular market would be similarly be harmed.

⁷ See 47 CFR §0.457(d)(2)(i).

⁸ See In re Western Union Telegraph Company, 2 FCC Rcd. 4485, 4487 (1987).

in ruling on the Petition. The FCC should return the data to the CPUC.

III. THE FCC CANNOT DRAFT A PROTECTIVE ORDER THAT WILL ADEQUATELY PROTECT THE CONFIDENTIALITY OF THE CELLULAR CARRIERS' PROPRIETARY DATA WHILE ENABLING ALL OF THE PARTIES TO MEANINGFULLY PARTICIPATE IN THIS PROCEEDING.

In the event that it determines that any confidential data should be released, the FCC has drafted and sought comments on a draft protective order. However, a review of the draft protective order illustrates that it is virtually impossible to fashion a protective order that would allow parties to meaningfully participate in the proceeding while at the same time adequately protecting the confidentiality of the carrier-specific confidential data.

The FCC's ruling on the Petition will dramatically impact the wireless market in California. Because of the important interests at stake, the FCC has a strong incentive to ensure that all interested parties have an adequate opportunity to participate in the proceeding and that their due process rights are protected. Accordingly, if the FCC were to adopt a protective order it would want to afford parties relatively free access to the confidential data.⁹ However, such a protective order would by definition lead to the release and misuse of the carriers' confidential data.

First because of its important nature, there is already a large number of parties who are actively participating in this

⁹ The FCC's draft protective order appears to follow this approach. See Draft Protective Order at ¶ 3.

proceeding and this number may increase. The more people who gain access to the confidential data, the more likely it is to be disclosed or misused.

Second, the majority of parties to this proceeding either are competitors or potential competitors of BACTC in the market for wireless services. The draft protective order allows practically any employee, attorney or consultant -- including those who are themselves engaged in developing marketing and sales strategies -- access to confidential data of its competitors.¹⁰ These individuals have a significant incentive to use this data to gain a competitive advantage over other providers in the wireless market. Even if they do not intend to violate the order, as a practical matter once someone knows this type of information it is almost impossible for that person not to allow it to influence any business decisions.

Third, certain of the recipients of the confidential data would have little incentive not to release or misuse it. A number of the parties to the proceeding are unregulated entities. Accordingly, it is unclear what sanctions the FCC could impose on them if they violated the terms of the protective order. Moreover, although the carriers may be deterred from misusing

¹⁰ The only restriction the draft protective order places on the recipient is that he or she must have been "requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to provide material for the express purpose of formulating filings in connection with PR Docket No. 94-105." Draft Protection Order at ¶ 3(b). As a practical matter, this places almost no limit on the number or type of people who may access the data.

other carriers' data by the fact that those carriers have comparable confidential data regarding their operations, no such deterrent exists for parties like Nextel Communications, Inc. and the NCRA who have no confidential data at risk.

The FCC could reduce the possibility that the carriers' confidential data would be released or misused by adopting a very stringent protective order. Such a protective order would have to strictly limit access to a small group of outside counsel and unaffiliated experts, who have no involvement in marketing or other strategic activities of any wireless telecommunications company. Although such an order would provide more protection for the confidential data, it would make it extremely difficult for the parties to meaningfully participate in the proceeding since the parties who know enough to evaluate the data would be effectively precluded from reviewing it or commenting upon it. BACTC's case is illustrative.

BACTC's opposition to the Petition was prepared by BACTC's two in-house counsel without the assistance of outside counsel or experts. Both of these counsel advise BACTC on an almost daily basis with regard to marketing and other competitively sensitive issues. One of the counsel sits on the executive staff of BACTC which develops company-wide policies and strategies. Accordingly, under a restrictive type of protective order, BACTC's in-house counsel would not be entitled to access the confidential data. Presumably BACTC would have to retain outside counsel to review and comment on the data released

pursuant to the protective order.¹¹ This would be difficult for the outside counsel since, to date, they have not participated substantively on BACTC's behalf in the proceeding and because they would have to evaluate the data without the assistance of any BACTC employees. They may even have to hire an outside expert to help them evaluate the data. These types of restrictions would effectively deny BACTC an ability to meaningfully participate in this proceeding.¹²

Moreover, no protective order could make BACTC or the other cellular carriers comfortable about the receipt of the trade secrets and commercially sensitive data of its competitors.¹³ As the CPUC noted in its Request for Confidential Treatment, the Attorney General of the State of California is conducting an ongoing investigation of the cellular industry within California to determine compliance with antitrust laws. BACTC cannot be put in the position of having to justify to the Attorney General why it possesses data that is proprietary

¹¹ Moreover, it is not even clear that all outside counsel could meet the standard of having no involvement in any marketing activities or other strategic decisionmaking of their clients.

¹² Such restrictions would also preclude parties who do not have the resources to hire outside counsel from meaningfully participating in the proceeding.

¹³ In this regard it is significant that even though BACTC and other carriers have had the opportunity to obtain copies of the confidential data submitted by various California cellular carriers to the CPUC pursuant to a protective order, no carrier has requested this data from any other carrier. In fact, to date only the Cellular Resellers Association has sought release of the confidential data pursuant to a protective order, and then only from certain carriers.

to its competitors or to prove that such information was not used in any manner for anti-competitive purposes.

IV. AN ADOPTION OF A PROTECTIVE ORDER AND THE SUBSEQUENT RELEASE OF DATA WOULD ALMOST CERTAINLY DELAY THE PROCEEDING AND IMPAIR THE FCC'S ABILITY TO MEET ITS STATUTORY DEADLINE.

The Omnibus Budget Reconciliation Act of 1993 requires that the FCC resolve the state's petitions to retain regulatory authority over cellular service rates within twelve months.¹⁴ The FCC has recently recognized the difficulty of meeting this deadline: "the Commission is faced with stringent statutory deadlines in a complex and massive proceeding."¹⁵ To ensure that its ability to comply with the statutory deadlines is not impaired, the FCC recently only permitted a two-week extension of time to file reply comments, instead of the five-week extension the CPUC had requested.¹⁶ The disclosure of the confidential data redacted from the Petition pursuant to a protective order would have much greater dilatory potential than the five-week extension sought by the CPUC to file reply comments. For this additional reason, the redacted information should not be disclosed pursuant to a protective order or under any circumstances.

¹⁴ 47 U.S.C. §332 (c) (3).

¹⁵ Order Extending Time and Permitting Replies to Revised Petition at 2, PR Docket No. 94-105, released September 26, 1994.

¹⁶ Id.

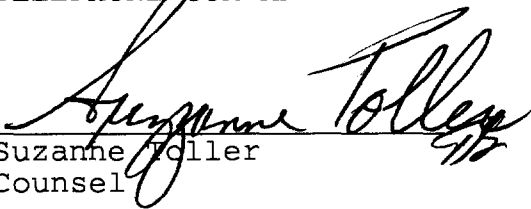
V. CONCLUSION.

For the reasons stated above, BACTC respectfully requests that the Commission not release the carriers' confidential data under any circumstances, including a pursuant to a protective order, and that the information be returned to the CPUC.

Dated October 7, 1994

Respectfully submitted,

BAY AREA CELLULAR
TELEPHONE COMPANY

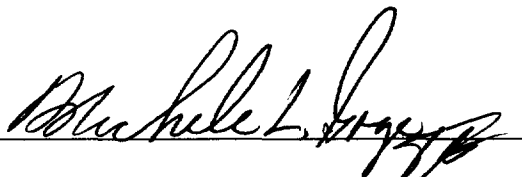

Suzanne Toller
Counsel

CERTIFICATION OF SERVICE

I, Michele L. Gage, certify that I have on this date caused the foregoing COMMENTS OF BAY AREA CELLULAR TELEPHONE COMPANY ON DRAFT PROTECTIVE ORDER in the Matter of Petition of the people of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates to be served on the to all parties on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of October, 1994, at South San Francisco, California.


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